IN THE HIGH COURT OF DELHI AT NEW DELHI

CS(OS) No.1636/2000

S.B.I. Factors & Commercial Services Ltd. .....Plaintiff
through: Mr. Subhash Chandra, Advocate

VERSUS

$ Ispat Structural Private Ltd. & Ors. .....Defendants
^ through: Nemo.

% DATE OF DECISION: 05-12-2006

CORAM:
* HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether judgment should be reported in Digest?

: REVA KHETRAPAL, J. (Oral)

1. This is a suit for recovery filed by SBI Factors and Commercial Services Private Ltd. registered under the Companies Act, 1956 under Order XXXVII Code of Civil Procedure. Initially, the defendants were served with summons for appearance in the prescribed format for suits under Order XXXVII Code of Civil Procedure and entered appearance. Subsequently, however, summons for judgment could not be served upon the defendants as the defendants were found not to be residing at the address furnished by them on the memorandum of appearance filed by

Signature Not Verified
Digitally Signed By:ANULYA
Certify that the digital file and physical file have been compared and the digital data is as per the physical file and no page is missing.

them. Consequently, summons for judgment were served upon defendants No.1 and 5 by publication in "Statesman" (New Delhi edition) dated 15th June, 2005 and defendants No.2, 3 and 4 were served by publication in "Amar Ujala" (Punjab edition) dated 1st September, 2006. None entered appearance on behalf of the defendants even after service of summons for judgment in the prescribed format. Unfortunately, it was not pointed out to this Court on 11.10.2006 that the suit seeks summary judgment against the defendants. This resulted in an order being passed to the effect that the defendants are proceeded ex parte. Plaintiff was directed to lead evidence by way of affidavit.

2 Affidavit by way of evidence has been filed by the plaintiff through Shri Rajeev Saxena, Vice President, SBI Factors and Commercial Services Pvt. Ltd. 12 documents have been exhibited and proved by the plaintiff being Exhibit PW1/A to Exhibit PW1/L through the affidavit by way of evidence. These documents include General Power of Attorney dated 15th April, 2005 in favour of Shri Rajeev Saxena executed by the Managing Director of the plaintiff Company under power conferred upon him by virtue of resolution passed in the meeting held on 27th September, 1993. True copies of the Board resolution dated 27th September, 1993 and General Power of Attorney dated 15th April, 2005 are collectively marked as Exhibit PW1/A. Exhibit PW1/B is the true copy of the Power of Attorney dated 10th June, 1998 in favour of Shri Pradeep Sholapurkar, the Branch Manager

and Principal Officer of the New Delhi branch of the plaintiff Company at the time of the institution of the present suit executed by the Managing Director of the plaintiff Company, which establishes the authority of Shri Pradeep Sholapurkar to sign, verify and institute the suit. Exhibit PW1/C is the approval letter dated 30th May, 2000 issued by the Head Office/Registered Office of the plaintiff Company to institute the present suit.

3. The plaintiff seeks recovery of the total sum of Rs.46,28,376.02 as on 31st May, 2000 on the basis of Factoring Agreement dated 9th January, 1998, Agreement of Hypothecation dated 9th January, 1998, Deed of Guarantee dated 9th January, 1998 and 2nd February, 1998 and Balance Confirmation Letters dated 31st March, 1998 and 1st April, 1999.

4. The case of the plaintiff Company is that the plaintiff Company carries on business, amongst others, of grant of Factoring facilities by way of purchase of debts with recourse, debts collection, pre-payment against invoice or invoices and bills. The defendant No.1 Company, through defendants No.2 to 5 applied for grant of Factoring facilities by way of Debt purchase limit of Rs.80 lakhs and pre-payment limit of Rs.50 lakhs to the plaintiff Company knowing well about the nature of business of the plaintiff Company. The plaintiff Company sanctioned the Factoring Facility as per application of the defendant No.1 Company vide sanction letter dated 8th January, 1998 with certain terms and conditions. Defendant

No.1 through defendants No.2 to 5 consented for all the terms and conditions stipulated in the sanction letter dated 8th January, 1998 which was duly signed by them and a copy of the sanction letter was returned to the plaintiff in token under their signature (the Director of defendant No.1 Company). Copy of the sanction letter dated 8th January, 1998, duly signed by the defendant is Exhibit PW1/D.

5. As per terms of the sanction letter dated 8th January, 1998, the plaintiff and defendant No.1 (through defendants No.2 and 5) entered into a Factoring Agreement dated 9th January, 1998. As per one of the terms of the Factoring Agreement dated 9th January, 1998, the defendant No.1 furnished the details of its customers to the plaintiff, out of which some customers (of the defendant No.1 Company) were approved by the plaintiff. Factoring Agreement dated 9th January, 1998 duly signed by the defendants No.2 and 5 on behalf of defendant No.1 Company is Exhibit PW1/E.

6. As per one of the terms of the Factoring Agreement dated 9th January, 1998, the plaintiff Company released the pre-payment on invoice drawn on such of the customers of the defendant No.1 Company which were approved by the plaintiff on submission of copy of invoice and documents showing dispatch/delivery of goods. The plaintiff released the amount upto 80% of the invoice amount to the defendant No.1. Thus, the defendant No.1 would receive immediate payment without having to wait for its customer to make payment on due date. The defendant No.1 agreed

to pay interest at such rate/rates as was agreed from time to time between the plaintiff and defendant No.1 upon the pre-payment amount received by the defendant No.1 from the plaintiff. As per terms of the Factoring Agreement dated 9th January, 1998, the defendant No.1 agreed and directed such of its customers, approved by the plaintiff to directly make payment to the plaintiff of the amount of the invoices in respect of the goods sold to them and which were factored by the plaintiff.

7. Defendant No.1 also executed an Agreement of Hypothecation dated 09.01.1998 by way of first charge in favour of the plaintiff as security for the payment of amounts due and payable by the defendant No.1 to the plaintiff. The Hypothecation Charge was duly registered with the Registrar of Companies, Jalandhar. Agreement of Hypothecation dated 9th January, 1998 executed by the defendants No.2 and 5 on behalf of the defendant No.1 Company is Exhibit PW1/F.

8. On 9th January, 1998, the defendant No.1 agreed to pay compound interest at the rate of 17.25% p.a. Later on, i.e., with effect from 01.09.1998, the defendant No.1 agreed to pay 17.50% interest p.a. inclusive of interest tax with monthly rests. Letter dated 25.09.1998 showing revision of rate of interest is Exhibit PW1/G.

9. As per terms of the Factoring Agreement dated 9th January, 1998, the invoice amount would directly become payable by the customers (approved by the plaintiff) of the defendant No.1 to the plaintiff Company and not to

the defendant No.1. In case of failing to make payment to the plaintiff of the invoice amount, the defendant No.1 undertook to remain liable to repay the amount advanced by way of pre-payment along with finance and interest charges in terms of Factoring Agreement dated 9th January, 1998 (Exhibit PW1/E).

10. In consideration of the plaintiff granting the said Factoring facilities to defendant No.1 by way of debt purchase limit and pre-payment limit, the defendants No.2 to 5 agreed to stand as guarantors to secure the plaintiff. Thus, the defendants No.2 and 5 in their capacity as guarantors undertook and guaranteed jointly and severally to pay on demand to the plaintiff and without demur the dues of defendant No.1 in the event of default on the part of the defendant No.1 in making payment to the plaintiff. Hence the defendants No.2 and 5 executed a Deed of Guarantee dated 9th January, 1998 in favour of the plaintiff.. As per terms of the Deed of Guarantee dated 09.01.1998, the defendants No.2 and 5 gave continuing guarantees for Rs.50,00,000/- (Rupees Fifty Lakh Only) to secure the plaintiff in respect of the dues of defendant No.1. Similarly, the defendants No.3 and 4 had also executed the Deed of Guarantee dated 2nd February, 1998, in their personal capacity to secure the Factoring Facility provided by the plaintiff. The defendants No.3 and 4 gave continuing guarantees for Rs.50,00,000/- (Rupees Fifty Lakh Only) to secure the plaintiff in respect of the dues of defendant No.1. Defendants No.2 and 5 agreed that the guarantee given by

them shall be irrevocable and absolute and their liabilities for the plaintiff shall be as principal debtors. Deed of Guarantee dated 9th January, 1998 executed by the Defendants No.2 and 5 and Deed of Guarantee dated 2nd February, 1998 executed by the Defendants No.3 and 4 are Exhibit PW1/H (Colly.).

11. Defendant No.1 had acknowledged the outstanding balance as per availed Factoring Facility vide Balance Confirmation Letters dated 31.03.1998 and 01.04.1999. Balance Confirmation Letters dated 31.03.1998 and 01.04.1999 are Exhibit PW1/I (Colly.).

12. As per terms of the Factoring Agreement dated 9th January, 1998, the plaintiff was entitled to receive from the customers (approved by the plaintiff) of the defendant No.1, the invoice amount in respect of the goods sold by defendant No.1 to its customers. However, most of the customers of defendant No.1 did not make payment to the plaintiff. Consequently, the defendant No.1 continued to be liable to repay to the plaintiff the amount received by way of pre-payment as also finance interest and other charges. Since defendant No.1 had defaulted in making payment to the plaintiff, the defendant No.1 alongwith defendants No.2 and 5 are jointly and severally liable to make payment to the plaintiff. Accordingly, the plaintiff through its Advocate demanded the payment of the amount from the defendants due to the plaintiff by serving notice of demand dated 31.05.2000 through registered post. The defendants either refused to accept the notice or

avoided receiving the same. No reply to the notice dated 31.05.2000 was received by the plaintiff. Copy of notice dated 31.05.2000, original Speed Post receipts and returned Registry covers are Exhibit PW1/J (Colly.).

13. Since most of the customers of defendant No.1 did not make payment to the plaintiff of the invoice amount nor the defendants were bothered about the admitted outstanding balance payable to the plaintiff, the present suit has been filed for the amount due from the defendant No.1 which comes to a total of Rs.46,28,376.02 (Rupees Forty-Six Lakhs Twenty Eight Thousand Three Hundred Seventy Six and Two paisa only) as on 31.05.2000 as per terms of the Agreements. Copy of Statement of Account showing outstanding balance is Exhibit PW1/K.

14. The plaintiff, finding no other way filed a Civil Suit under Order XXXVII of the Code of Civil Procedure, 1908 in this Court against the defendants No.1 to 5 on the basis of Factoring Agreement dated 9th January, 1998, Agreement of Hypothecation dated 9th January, 1998, Deed of Guarantee dated 9th January, 1998 and 2nd February, 1998 and Balance Confirmation Letters dated 31.03.1998 and 01.04.1999. As already stated, the defendants stopped appearing after entering appearance. Accordingly, summons for judgment were issued to the defendants by publication in the newspaper, namely, "Statesman" dated 15.06.2005 (New Delhi edition) with regard to defendants No.1 and 5 as well as newspaper, namely, "Amar Ujala" dated 01.09.2006 (Punjab edition) with regard to defendants No.2, 3

and 4. Newspaper "Statesman" dated 15.06.2005 (New Delhi edition) and "Amar Ujala" dated 01.09.2006 (Punjab edition) are Exhibit PW1/L (Colly.).

15. Provisions of Order XXXVII, Sub-rule 6 provide that if the defendant does not apply for leave to defend upon service of summons for judgment upon him, the plaintiff shall be entitled to judgment forthwith. In the instant case, the defendants have been served with summons for judgment by substituted service and have not applied for leave to defend the suit, thereby entitling the plaintiff to a decree in his favour. Plaintiff has established the claim in the plaint as per evidence laid by him. Suit is accordingly decreed in the sum of Rs.46,28,376.02 (Rupees Forty-Six Lakhs Twenty Eight Thousand Three Hundred Seventy Six and Two paisa only) in favour of the plaintiff and against the defendants. Interest at the rate of 17.50% p.a. with monthly rests from 1st June, 2000 till the date of payment shall also be payable by the defendants to the plaintiff. Defendants are held jointly and severally liable to make payment of the decretal amount.

16. Plaintiff would also be entitled to costs.

17. CS(OS) No.1636/2000 and IA No.1918/2004 stand disposed of accordingly.

Reva Khetrapal

December 5, 2006
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REVA KHETRAPAL, J.

Put upon office note alt 28/4/07 for Taxation of cost

Rs. 47532=80 Cost Collected

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i.20

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CS(OS) 1636/2000

SBI FACTORS & COMMERCIAL SERVICES LTD ..... Plaintiff
Through: Mr. Subhash Chander, Adv.

versus

ISPAT STRUCTURAL CF+ ..... Defendant
Through: Mr. Anshu Mahajan, Adv. For D-2 and 3.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

ORDER

% **30.07.2012**

I.A.No. 11767/2009 (U/o 37 R 4 CPC filed by D-2 and 3.

1. This is an application filed under Order 37 Rule 4 CPC for setting aside of the judgment and decree of this Court dated 15.12.2006 whereby the suit of the plaintiff under Order 37 CPC was decreed on account of failure of the defendants, including the applicants/defendant Nos.2 and 3, to file their applications for leave to defend.

2. On being served of the summons of the suit, the defendants entered appearance through counsel as noted in the order sheet dated 27.11.2000. Summons for judgment were thereafter issued. For 8.5.2001, the service

report was that the defendants could not be served as they were not residing at the given address. Thereafter, though there are some defaults on behalf of the plaintiff, however, the court even issued court notice to the counsel for the defendant who failed to appear in spite of his being served. Ultimately, summons for the judgment were directed to be effected by the publication and which publication was done in two newspapers. One in 'The Statesman', New Delhi Edition for 15.6.2005 and qua the defendant nos. 2 to 4 in Amar Ujala (Punjab Edition) on 1.9.2006.

3. Though, the suit was filed as under Order 37 CPC, this aspect escaped the attention of a learned Single Judge of this court as it was not so pointed out, and consequently, the case was fixed for filing of the affidavit by way of evidence by the plaintiff vide order dated 11.10.2006. This affidavit by way of evidence was filed on behalf of the plaintiff, and the plaintiff proved and exhibited the necessary documents. I may note that the subject suit was a suit for recovery of money on a factoring agreement as per which the defendant sells the goods to its customers but receives money of the invoices in advance from the plaintiff/finance company by discounting the invoices i.e. defendant receives the money from the plaintiff for the invoices and the plaintiff company thereafter receives the money of the invoices from the

customers of the defendant no.1.

4. On 5.12.2006 noting that the plaintiff had duly proved its case in terms of the affidavit by way of evidence filed, however, noting that the suit was under Order 37 CPC, the suit was decreed as the applications for leave to defend were not filed by the defendants after service of the summons for judgment by publication.

5. Now the present application has been filed seeking to setting aside the judgment and decree dated 15.12.2006 making essentially the following averments:-

(i) The plaintiff did not make sufficient effort for service of the defendants of summons for judgment and the order for publication was not justified.

(ii) The counsel appearing for the defendants was guilty of negligence as he did not pursue the case properly on behalf of the defendant.

(iii) The applicant/defendant nos. 2 and 3 have a good case on merits as stated in para 23 of this application.

6. In my opinion, the application is a gross abuse of process of law. When the summons for judgment were issued, the defendants somehow or the other seem to have got a service report that they have left the address,

however, the fact of the matter is that the defendants had not left the stated address inasmuch as admittedly (and this being not disputed) the defendants are still as on today very much present at the address which is stated in the plaint. The result was that the plaintiff was put to unnecessary expense of publication in two newspapers. Not only that, negligence (and if I say so deliberate negligence) of the applicants/defendants is writ large because in the application under Order 37 Rule 4 CPC it is not stated as to for the long period of time from filing appearance till the present application was filed, what was the correspondence/communication by these defendants with their then lawyer, with respect to the suit. As is not unusual in these cases of recovery of monies, all endeavors are made by the defendants who have to pay moneys to delay and drag the suit. Merely making averments that their earlier counsel was negligent, in my opinion, will not help the defendants, because, in cases such as the present, there is also a bounden duty of the defendants , at least at some infrequent intervals, to pursue their advocate with respect to the status of the case. For a few weeks or a few months the defendants may not keep in touch, however, once this period expands to more than a year, I am not able to accept the explanation of the blame being laid at the door of the earlier counsel. Further, an aspect to be noted is that in

Order 37 CPC, it is provided that once appearance is entered, the summon for judgment need only be "left" at the stated address. The object of this provision is to avoid any delay in trial of an Order 37 suit for which a special procedure is carved out. The fact of the malafides of the defendants can also be seen from the fact that its earlier counsel did not appear even after court notice was issued to him pursuant to the orders of this Court.

7. In my opinion, therefore, it does not lie in the mouths of the defendants to show that the ex parte decree has been wrongly passed against them and they have not been validly served of the summons for judgment. I also, discard in limine the arguments on behalf of the defendant nos. 2 and 3 that once there is a subsequent order for service, an earlier order of service stands waived though of course the argument is really such which I fail to understand inasmuch as since it is reported that the defendants were not found at the given address, the only way in which service could have been effected was by substituted service, and which was done.

8. In my opinion, the application is also misconceived inasmuch as now it is settled law that an application under Order 37 Rule 4 CPC must also contained the necessary ingredients as to why leave to defend should be granted as held in the case of ***Rajni Kumar Vs. Suresh Kumar Malhotra &***

Anr. (2003) 5 SCC 315 wherein the Supreme Court has clarified that the expression "special circumstances" as found under Order 37 Rule 4 CPC means stating merits on which leave to defend would have been granted. With regard to the merits firstly I must bring on record the crucial fact that the plaintiff in the plaint has made necessary averments with respect to the defendants acknowledging debt in writing under the signatures, and on which aspect there is no denial in the present application under Order 37 Rule 4 CPC. The only averments which have been made by the applicants on this aspect are contained in para 23 of the application which read as under:-

> "23. That without prejudice to the aforementioned submissions, the plaintiff submits that the present suit is even otherwise is not maintainable for the following reasons/grounds:-
>
> a) The present suit s devoid of any cause of action and no cause of action whatsoever has been pleaded by the Plaintiff in the present suit. A bare perusal of the plaint would show that the plaint is lacking in material particulars and even fails to give a single instance of any of the defendant's customers failing to make the payment and also fails to give a single instance of benefit under the factoring agreement being given to the Defendants.
>
> b) Except for a bald assertion that most of Defendants' clients did not make payment to the Plaintiff, the Plaintiff even does not mention:

I) What payments were made by the Plaintiff to the Defendant no.1 as pre-payments and on behalf of which customers and for which invoices;

II) Which of Defendant no.1's customers failed to make the payment to the Plaintiff;

III) What payments was defendant no.1 liable to make and in lieu of which pre-payments by the Plaintiff to Defendant no.1;

IV) The suit does not contain any statement of accounts to show as to what amount is pending/outstanding against the Defendants, and, if so, how.

c) That the Plaintiff has not come to the Hon'ble Court with clean intention and has tried to mislead the court into believing that the applicants have signed the deed of guarantee dated 09.01.1998 and 02.02.1998. No such has been signed by the applicants."

In my opinion, the aforesaid para 23, with its various sub-paras are only in the nature of negative defences and there is no denial with respect to this specific averment in the plaint of the defendant no.1 being granted factoring financing facility and that the defendant no.1 in fact enjoyed such facility and took monies from the plaintiff. Vague averments do not justify grant of leave to defend in cases such as the present especially where there is no denial of the written acknowledgment of debt. Once monies have been borrowed they have to be repaid. Of course, some businessmen think that money borrowed is money earned, however, obviously a Court cannot

subscribe to such a view.

9. I may finally state that there is a prayer in this application that referring the matter to arbitration under Section 8 of the Arbitration and Conciliation Act, 1996, and which prayer I need not look into inasmuch as, the ex parte decree has otherwise being sustained by me, and this prayer would have been examined only if the suit was revived by allowing the application which is being disposed of by this order. This prayer for reference of the disputes in the suit to arbitration is accordingly rejected.

10. In view of the above, the present application is dismissed with costs of ₹ 25,000/-. Costs be paid within two weeks from today.

I.A No. 11768/2009 (U/S 5 of the Limitation Act filed by D-2 & 3)

Since I have heard the application under Order 37 Rule 4 CPC of the applicants/defendant Nos.2 and 3, counsel for the plaintiff very fairly does not oppose this application and therefore, this application for condonation of delay is allowed subject to just exceptions.

VALMIKI J. MEHTA, J

JULY 30, 2012
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